2010 WL 5078873 (La.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Louisiana.
34th Judicial District
St. Bernard Parish

Shirley FRUGHT,
v.
LAFAYETTE INSURANCE COMPANY.

No. 107-245.
October 27, 2010.

Plaintiff Shirley Frught's Opposition to Lafayette Insurance Company's Motion for Partial Summary Judgment

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Div. “C”

To The Honorable, Judge Perry Nicosia, Louisiana District Judge In And For The 34th Judicial District Court, Parish of St. Bernard,

MAY IT PLEASE THE COURT:

Your honor, Mrs. Frught is in need of her trial. We ask that no hearing be had at all on Lafayette's Motion, that your honor carry it through trial and rule on it at the time of trial. We ask that your Honor set a trial date at our status conference to be held in your chambers on Wednesday, October 27, 2010 and that the Summary Judgment hearing of November 5, 2010 be upset without date.

We come to Court, yet again, because Lafayette Insurance Company still does not understand the law and still does not know how to read its own insurance policy. The Record in this matter is so voluminous that it burdens the Clerk of Court to bring it out for inspection. Lafayette, by their latest motion, offers not a shred of new evidence to support their claim, recycles the same old failed, misguided, and desperate arguments, and once again cites the insurance industry's garbage bag full of wrongly decided *Federal Court* cases. None of which are precedent in this Court. *See e.g. Willis-Knighton Medical Center v. Caddo-Shreveport Sales and Use Tax Commission*, 903 So.2d 1071 (La.2005) (Applying the plain language of a Louisiana statute and ignoring Federal 5th Circuit jurisprudence that was both voluminous and wrongly decided).

Lafayette's desperate attempt at unjustified relief is borderline sanctionable for at least two reasons. First, Lafayette offers no new evidence to support their repeated attempts at Summary Judgment. *See Zachary Financial, Inc. v. Darjean*, 2009 WL 382731 (La. 1st Cir. 2009) (unpub.) (McClendon, j. concurring) (“I believe that the law requires some new development in the case prior to the refiling of the motion on the identical issue”). To refile a Motion for Summary Judgment that has been denied previously would “risk sanctions” in that instance. *Id*.

The second reason Lafayette's Motion is borderline sanctionable conduct is because their underlying purpose in filing this motion is to once again delay the proceedings. Mrs. Frught has been all of the way to the Louisiana Supreme Court and back twice without a trial. *See Shirley Frught v. Lafayette*, 993 So. 2d 1271 (La. 2008); *Shirley Frught v. Lafayette*, 27 So.3d 270

(La. 2010). In fact, Mrs. Frught is almost 80 years old and still does not have a trial date. Lafayette seeks to delay the case even further, by requesting a ruling on a matter that has been briefed and argued in this Court several times already.

Lafayette's motive for this action can be traced to the recent ruling of the Louisiana 4th Circuit in this case. The 4th Circuit denied Lafayette's writ application on this Court's VPL ruling and noted that Lafayette failed to include the policy application involved in this case. In fact, Judge Tobias wrote separately to underscore the fact that it was legally proper to deny Lafayette's writ application and in very strong language spanked Lafayette for not including the policy application in its submission to the Court because Lafayette "had to know" the application was "central to the issue" before the Court. Judge Tobias continued his punishment by affirming the denial of relief and remarking "it is not this court's duty to practice law for the lawyers." *See Shirley Frught v. Lafayette*, no. 2010-C-1035, (La. 4th Cir. 07/30/2010) (Tobias, J. Concurring).

So, Lafayette's ploy is revealed. What they want to do is take yet another writ to the 4th Circuit once this Court properly denies Lafayette's motion, and this time attach the policy application to said writ application. Their hope is to delay the trial further.

Your honor, Mrs. Frught is in need of her trial. We ask that no hearing be had at all on Lafayette's motion, that your honor carry it through trial and rule on it at the time of trial. We ask that your Honor set a trial date at our status conference to be held in your chambers on Wednesday, October 27, 2010 and that the Summary Judgment hearing of November 5, 2010 be upset without date.

Lafayette's tactics are not new. Insurance companies love to delay trials against **elderly** plaintiffs who bring meritorious claims. That is what Lafayette is doing here. It is this type of system **abuse** that led the Louisiana legislature to amend La. Code of Civil Procedure Article 2164 earlier this year. New Article 2164 was sponsored by Representative Neil Abramson and signed into law by the Governor. It is effective beginning August 15, 2010 and authorizes the court to award sanctions for frivolous writ applications and attorney fees for both frivolous appeals and writ applications.

Lafayette is treading on thin ice. As to the "merits" of their argument, the only word to describe them is "frivolous." Lafayette seeks summary judgment on two issues. The first, "The Louisiana Valued Policy Law only applies to fire insurance policies" is not even in dispute. *See Lafayette's Motion for Summary Judgment*. Of course, La R.S. 22: § 1318 only applies to "fire insurance policies." In fact, the Court has granted Summary Judgment to Mrs. Frught on this issue. *See Attached Written Reasons for Judgment* at 13-17. viz: [1]

A. ***Under any fire insurance policy insuring inanimate, immovable property in this state***, if the insurer places a valuation upon the covered property and uses such valuation for purposes of determining the premium charge to be made under the policy, in the case of a total loss the insurer shall compute and indemnify or compensate any covered loss of, or damage to, such property which occurs during the term of the policy at such valuation without deduction or offset, unless a different method is to be used in the computation of loss, in which latter case, the policy, and any application therefor, shall set forth in type of equal size, the actual method of such loss computation by the insurer. Coverage may be voided under said contract in the event of criminal fault on the part of the insured or the assigns of the insured.

What is Disputed

What is disputed is the second prong of Lafayette's Motion for Summary Judgment, that is "even if it extends to perils other than fire, the Louisiana Valued Policy Law does not allow full recovery unless there is proof that the property is a total loss and the total loss is caused by a covered peril." Again, the Court has granted Mrs. Frught Summary Judgment on this issue which evidences Lafayette's failure to comprehend well-settled principles of Louisiana law. *See Attached Written Reasons for judgment*.

By this motion, Lafayette illegally attempts to shift the burden of proof from the insurer, where well-settled law says it should be, to Mrs. Frught. All Mrs. Frught need show is that there is a total loss to her home and that there is a covered loss. Lafayette,

who resists payment here, has the burden of proof that the damage to Mrs. Frught's home was caused by a covered peril. *See Attached Written Reasons for Judgment* at 10-12.

Lafayette's Motion must be denied in all respects not only because it shows a complete lack of legal understanding, but also a questionable understanding of the English language. From Lafayette's Memorandum:

> "Fire is the only peril specified in the LVPL, and is thus the only peril to which the statute applies."

Lafayette's Memorandum at 6.

What is so shocking about this bold statement, which undermines Lafayette's entire position in this case, is that the "LVPL" as Lafayette calls it, or §1318, ***does not specify a single peril!*** Section 1318 does not address "perils." What §1318 says is: "*Under any fire insurance policy insuring inanimate, immovable property in this state*."

The word "fire" is an adjective here describing the type of insurance policy to which the statute applies. Further, as the statute reads, §1318 applies to "*any*" insurance policy that 1) covers the peril of fire and 2) insures "*inanimate, immovable property in this state.*"

The perils that are "covered" under this statute are determined by the policy itself. For example, La.R.S. 22:6(10) defines a "fire and extended coverages policy." Because it covers the peril of fire, it is a "fire" policy. La. R.S. 22:6(15) defines homeowners policy as a "policy of insurance . . . . which combines fire and allied lines" it too, covers the peril of fire and is a "fire policy." Section 1318 applies to *any* fire insurance policy, so it comfortably includes the homeowner's policy at issue here.

Section 1318 has additional terms for application. The policy must be one where 1) the insurer places a valuation upon the covered property; and 2) uses such valuation for purposes of determining the premium charge to be made under the policy; and there is no 3) different method is to be used in the computation of loss. (contained in the policy and application).

If all of these conditions are met, there is still one more hurdle. Payment is only due for "covered" losses, as determined by the insurance policy. If in fact there is a "total loss" and a "covered loss" (as determined by the policy) then payment is triggered under §1318, when the suspensive condition of "in the case of total loss" occurs. Compensation is due the insured for "any covered loss" at the entire value of the policy, "without deduction or offset."

Lafayette's version of the statute does tremendous violence to it, and is wrong. Mrs. Frught adopts the attached *Written Reasons for Judgment in toto* and requests the Court to refer to them in its ruling. For the reasons outlined above and in the attached *Written Reasons for Judgment*, Lafayette's Motion for Summary Judgment must be denied.

Footnotes

1 The Louisiana Valued Policy Clause was formerly numbered La.R.S. 22: §695. In 2008, the Legislature renumbered, without changing, the provision to La.R.S. 22: §1318.

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